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No. 00-632
In the Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Supreme Court, U.S.
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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS, STATE OF MICHIGAN, ET AL

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REPLY ARGUMENT

EPA argues that petitioners mischaracterized the manner in which EPA considered cost-effectiveness in determining "significant contribution" in the NOx SIP Call rule. EPA Brief in Opp. 10. This is not true. These petitioners do not now contest EPA's representation that it utilized state of the art computer modeling of air quality to show magnitude, frequency, and relative amount of each upwind state's emissions contributions to each downwind nonattainment problem. EPA Brief in Opp. 5. The modeling, however, was used only to determine which states met a threshold (determined to be so low as to be within background noise) for inclusion in the pool of states subject to the SIP Call. The problem arises during the second stage of EPA's analysis. Once included in the SIP Call, a state's required reduction to eliminate its "significant contribution" as defined by EPA was based solely on the cost of controls under EPA's own notion of economic fairness. EPA Brief in Opp. 9. Air quality impacts were irrelevant. If a state's NOx emissions could be reduced at a cost of no more than $2,000 per ton, EPA considered them to be significantly contributing to some downwind state's nonattainment problems, never mind which state and to what extent. On the other hand, all of a state's NOx emissions which cost more than $2,000 per ton to eliminate were considered to not be significantly contributing to the downwind nonattainment problem and did not have to be eliminated regardless of the amount of actual impact downwind. Therefore, EPA's claim that "it *merely* considered emission control costs as part of its analysis" is misleading. EPA Brief in Opp. 14, (emphasis added).

There is no authority in § 110(a)(2)(D) for EPA to determine the amount of NOx reduction that each upwind state must make by defining "significant contribution" in any way other than air quality impacts downwind. After defining "significant contribution" in terms of air quality impact downwind in order to determine what states to include in the NOx SIP Call, EPA cannot redefine "significant contribution" in terms of the costs of implementing controls in order to determine the amount of NOx reduction each of the upwind states must make to eliminate its "significant contribution." Under the statute, a SIP must "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the state from emitting any air

pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other state with respect to any such" NAAQS. § 110(a)(2)(D). EPA's determination of the amount of each upwind state's required NOx reduction based on its notion of economic fairness unfairly requires some states to make greater reductions than other states with greater NOx emissions which are having a greater impact downwind. Furthermore, EPA's approach does not necessarily meet the statutory objective of eliminating all NOx emissions from upwind states that are having a significant impact on a downwind state's non-attainment problem. Injecting cost considerations frustrate the purpose of the statute, keeping in mind that the statute's objective is to prevent an upwind state from polluting a downwind state.

EPA acknowledges the holding in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) that "'Congress intended claims of economic and technological infeasibility to be wholly foreign to the Administrator's consideration of a [SIP].'" EPA Brief in Opp. 19, citing *Union Electric*, 427 U.S. at 256. EPA, however, suggests that the Court's recognition of possible exceptions to this general rule somehow negates *Union Electric* as authority for precluding "EPA from considering economic and technological factors when taking actions under Section 110(a)(2)(D)." EPA Brief in Opp. 19. The exception acknowledged by the Court, however, applied under § 110(a)(2)(A) which allowed EPA to consider costs to force a state to attain a NAAQS more promptly than the 3-year, technology-forcing deadline mandated in that section. The basis for such an exception rested upon the statutory language that a plan implementing a NAAQS provide for the attainment of such primary standard as "*expeditiously as practicable* but . . . in no case later than three years from the date of approval of such plan . . . ." (Emphasis added.) By contrast, § 110(a)(2)(E), [now § 110(a)(2)(D)], contained no such language that explicitly or implicitly provided for any consideration of economic or technological feasibility. In short, EPA fails to show how any exception as recognized under *Union Electric* to the general prohibition against cost consideration applies to § 110(a)(2)(D), the interstate transport provision.

No matter how laudable some may find EPA's attempt to inject its notion of economic fairness into its authority under § 110(k)(5) to enforce § 110(a)(2)(D), Congress granted EPA no authority to pursue such a goal in enforcing § 110(a)(2)(D). EPA is not free to pursue goals other than those designated under its grant of authority in the statute. On page 14 of its brief, EPA recognizes that cases such as *American Petroleum Institute v. EPA*, 52 F.3rd 1113 (D.C. Cir. 1995), and *Ethyl Corp. v. EPA*, 51 F.3rd 1053 (D.C. Cir 1995) hold "that, where a statutory provision unambiguously confines an agency's authority to the satisfaction of a specified goal, or to the consideration of a specified factor, the agency is not at liberty to take regulatory action under that provision to effectuate other goals, or to base its decision on other factors." EPA Brief in Opp. 14. EPA claims that it did not violate that principle. EPA, however, did violate that principle because in determining the different amounts of NOx reductions which EPA required each of the different upwind states to achieve, EPA did not focus on the "significant contribution" that each upwind state's NOx emissions were making downwind, but instead made the determination based on its own notion of economic fairness, a goal that is neither stated nor inferred in § 110(a)(2)(D).

In its brief, EPA attempts to distinguish the cases cited by the Michigan petitioners in support of their position that EPA cannot consider the cost of controls under § 110(a)(2)(D). EPA cites another set of cases as alleged authority that EPA can consider costs under § 110(a)(2)(D). Petitioners believe that EPA's cases do not apply, however, the point is that certiorari should be granted in this case in order to clarify whether EPA can consider costs in issuing a SIP Call to enforce § 110(a)(2)(D).

Respectfully submitted,

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